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No. 94-1154

In the Supreme Court of the United States

OCTOBER TERM, 1994

JEANETTE MARIE GILLIES GRYBOS, ET AL.,
PETITIONERS

v.

DEPARTMENT OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the two-year statute of limitations applicable to petitioners' suit under the Federal Tort Claims Act began to run in 1952, when the State Department cancelled petitioners' derivative U.S. citizenship, or in 1985, when a federal district court declared that petitioners were U.S. citizens.

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OPINIONS BELOW

The order and oral opinion of the court of appeals (Pet. App. 38-44) are unpublished, but the decision is noted at 36 F.3d 1097 (Table). The opinion of the district court (Pet. App. 32-36), adopting the Report and Recommendation of the Magistrate Judge (Pet. App. 1-31), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1994. The petition for a writ of certiorari was filed on December 27, 1994 (a Tuesday following a Monday Holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are sisters whose father, John St. Clair Gillies, was born in Australia. Sometime before 1900, Mr. Gillies moved to the United States and became a naturalized citizen. Pet. App. 4. Mr. Gillies then moved to the Philippine Islands, where he married, raised a family, and became the owner and operator of a mining company. *Ibid.* During World War II, the Japanese interned Mr. Gillies and petitioner Grybos, "apparently because they were American civilians." *Id.* at 5. John Gillies was released after about seven months and taken to a hospital, where he died a few days later. *Ibid.* After his death, the Japanese retained his passport and other identifying papers. *Ibid.*

In late 1945, petitioners decided to move to the United States. Pet. App. 5. A U.S. government official held a hearing in the Philippines to determine if petitioners were American citizens. *Ibid.* The official was informed by the State Department that passports had been issued to a John Gillies who was a naturalized citizen from Scotland. Although that John Gillies was not petitioners' father, petitioners were allowed to enter the United States as citizens early in 1946. *Id.* at 6.

Problems with petitioners' citizenship status became apparent by 1952. Pet. App. 6. In a letter dated October 28, 1952, the State Department informed petitioner Grybos that it was refusing to issue a passport to her brother. *Ibid.* The letter explained that the Department had erroneously used the records of another John Gillies as the basis for admitting petitioners to the United States in 1945, and that the Department was unable to find any passport records for petitioners' father. *Id.* at 7, 17. In the letter, the State Department suggested that petitioners take prompt action to clarify

their citizenship status with the Immigration and Naturalization Service. *Id.* at 7. Petitioners were unsuccessful in subsequent attempts to convince the State Department of their American citizenship because they were not able to produce proof that their father was a naturalized American citizen. *Id.* at 7-8.

2. In 1982, petitioners filed suit in the United States District Court for the Northern District of Ohio, under 8 U.S.C. 1503, seeking a declaration of their citizenship status. Pet. App. 8. In a decision dated February 5, 1985, the court declared petitioners to be United States citizens. The court found from secondary evidence and witness testimony that petitioners' father was a naturalized American citizen at the time of his death, and that petitioners accordingly had acquired derivative citizenship through him. *Ibid.*

3. In February, 1987, petitioners each filed an administrative claim with the State Department under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, 2671-2680, seeking damages for deprivation of their rights as United States citizens arising out of the government's allegedly negligent cancellation of the citizenship of their father, John Gillies, in 1952. Pet. App. 8-9. That cancellation had allegedly resulted in petitioners' loss of derivative citizenship, and, concomitantly, in the loss of their rights to travel abroad and to inherit John Gillies's mining rights in the Philippines. *Id.* at 2-3. On October 2, 1991, the State Department denied petitioners' claims on the ground that they were time-barred. *Id.* at 9.

4. On April 3, 1992, petitioners filed the instant suit in the United States District Court for the Northern District of Ohio, claiming that the government negligently revoked their citizenship. Pet. App. 9. The district court granted the government's motion to

dismiss petitioners' case on the ground that petitioners had not filed their tort claim with the State Department within two years after it accrued, and the claim therefore was barred by the applicable statute of limitations, 28 U.S.C. 2401(b). Pet. App. 12-13, 37.[1]

Applying the standard set forth by this Court in *United States* v. *Kubrick*, 444 U.S. 111 (1979), the district court held that petitioners' claim had accrued in 1952, when petitioners were informed of the revocation of their father's citizenship[2] and were refused U.S. passports, thus keeping them from visiting their relatives in the Philippines. Pet. App. 14, 17-18. At that time, petitioners knew that they had been injured, and knew who had inflicted the injury; thus, both prongs of *Kubrick*'s test were satisfied, and the statute of limitations began to run.[3]

The district court rejected petitioners' claim that they could not have filed the tort suit until after they obtained, in 1985, a declaration that they were U.S. citizens. Noting that petitioners had "known the essential facts about their injury for approximately forty

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[1] The district court adopted in full the Report and Recommendation of the Magistrate Judge to whom the case had been referred. Pet. App. 35.

[2] The district court apparently determined that the State Department's 1952 letter was tantamount to a revocation or cancellation of John Gillies's citizenship and, concomitantly, a cancellation of petitioner's derivative citizenship. Pet. App. 34, 35.

[3] Although the court was unable to determine from the record when petitioners learned that they would be deprived of their inheritance in the Philippines for lack of U.S. citizenship, the court found that point irrelevant. Pet. App. 18. It was sufficient that petitioners suffered a "significant and discernible" harm in 1952; it was not necessary for them to know the full scope of their injuries at that time. *Ibid.*

years" (Pet. App. 20), the court held that, while the ruling in the 1985 citizenship case was "helpful in clarifying the issues in this case, it was not a necessary predicate to [petitioners'] filing * * * suit" (*id.* at 20-21).[4]

The court distinguished *United States* v. *One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972), on which petitioners relied. Pet. App. 21. In that case, the Fifth Circuit held that the plaintiff's claim challenging a 1963 forfeiture of property had not accrued until 1971, when this Court decided a case holding that such a forfeiture was unlawful. 457 F.2d at 1358. Before the 1971 case, the plaintiff was not merely ignorant of his rights; he was "a plaintiff without a right." *Ibid.* The district court found *Red Chevrolet* distinguishable because the 1985 citizenship ruling did not establish a new cause of action—Congress had established the right to sue the United States in tort in 1949, and enforcement of

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[4] The court analogized the instant case to *Hohri* v. *United States*, 586 F. Supp. 769 (D.D.C. 1984), aff'd, 847 F.2d 779 (Fed. Cir.) (per curiam) (adopting district court's opinion), cert. denied, 488 U.S. 925 (1988). Pet. App. 19-20. In *Hohri*, the Federal Circuit rejected as time-barred an FTCA suit brought in the 1980s by survivors of this country's internment of Japanese-Americans during World War II. The plaintiffs in *Hohri* had argued that this Court's decision in *Korematsu* v. *United States*, 323 U.S. 214 (1944), holding that evacuation of Japanese-Americans was a military necessity, would have made it futile for them to bring their suit at the time of their injury in the 1940s, and that new information became available in 1982. See *Hohri*, 586 F. Supp. at 788. The Federal Circuit affirmed the dismissal of the plaintiffs' complaint because they had all the necessary information to file their suit in the 1940s—they knew they had been injured and who had injured them. *Id.* at 787. Although it might have been difficult to prevail in the face of *Korematsu*, it was not impossible. *Id.* at 788.

that right did not require a plaintiff to be an American citizen. Pet. App. 22.

The district court further noted that *Red Chevrolet* had recognized the need to interpret accrual "in light of the general purposes of the limitations statute and the practical ends to be served by the limitation of actions." Pet. App. 22. In this case, the court observed, the purposes of protecting the defendant and the courts "'from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence' * * * would not be especially well-served by allowing this case to go forward forty years after the operative facts occurred." *Id.* at 23 (quoting *Kubrick*, 444 U.S. at 117). As neither the government nor petitioners had produced any documentary evidence of John Gillies's naturalization, and the memories of witnesses would have faded significantly since 1952, allowing petitioners' suit to proceed would "defeat the purpose of and the protection afforded by § 2401(b)." *Id.* at 23-24.

Finally, the court rejected petitioners' reliance on the diligence-discovery rule, which postpones accrual of a cause of action "until the plaintiff has or with reasonable diligence should have discovered the critical facts of his or her injury." Pet. App. 24. The court reiterated that petitioners knew by 1952 the critical facts necessary to their claim—that they were injured by the cancellation of their father's citizenship, and that the State Department was responsible for that injury. *Id.* at 25-26, 27.[5]

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[5] The court concluded that two cases relied on by petitioners were inapposite. In *Barrett* v. *United States*, 689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983), the FTCA statute of limitations was held to be tolled by the government's "intentional concealment of material facts relating to the Army's responsibility" in negligently conducting secret chemical warfare

5. The court of appeals unanimously affirmed. Pet. App. 38. Ruling from the bench after oral argument, Judge Boggs concluded that there was "no question" that petitioners knew of their injury and its source in 1952, and that the statute of limitations therefore began to run at that time. *Id.* at 41, 43.[6] The court held that there was no concealment within the meaning of prior cases that would lead to a tolling of the statute (*id.* at 41), and it distinguished *Red Chevrolet*, as did the district court: *Red Chevrolet* involved the recognition of an entirely new cause of action as a matter of law, while the instant case involved, "at most, a change in the ruling as a factual matter * * * by the U.S. District Court * * * which properly granted [petitioners] their citizenship." *Id.* at 42. Finally, the court cited *Hohri* in support of its ruling; in that case, the Federal Circuit held that "the statute of limitations began to run under conventional principles" even though plaintiffs were unlikely to prevail in light of adverse Supreme Court precedent. *Ibid.*

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experiments. *Id.* at 328. In this case, by contrast, the fact that petitioners' father was a naturalized citizen "was not a fact *concealed* by the State Department, but a fact *determined* by the federal district court." Pet. App. 26. In *Attallah* v. *United States*, 758 F. Supp. 81 (D.P.R. 1991), aff'd, 955 F.2d 776 (1st Cir. 1992), the plaintiffs could not have known until the conclusion of a federal law enforcement investigation that U.S. Customs Agents were responsible for the robbery and murder of plaintiff's courier. Pet. App. 26-27.

[6] In an apparent inadvertence, the court first referred to 1951 as the year in which petitioners' cause of action accrued. Pet. App. 41. The court later correctly identified the year as 1952. *Id.* at 43.

ARGUMENT

All suits brought under the FTCA are subject to a two-year statute of limitations. 28 U.S.C. 2401(b).[7] This Court has held that a tort claim accrues under the FTCA as soon as the plaintiff is "in possession of the critical facts that he has been hurt and who has inflicted the injury." *United States* v. *Kubrick*, 444 U.S. 111, 122 (1979). The court of appeals correctly applied this settled principle of law.

The court of appeals determined that the two-year statute of limitations began to run in 1952, when the State Department revoked its earlier finding that petitioners' father was a naturalized citizen, denied petitioners' brother a passport, informed petitioners that they had been erroneously admitted into the United States, and advised them to take steps to clarify their citizenship status. Pet. App. 17. Petitioners became aware at that time of both their asserted injury (lack of recognition of their citizenship) and its cause (the refusal of the State Department to recognize their father's citizenship). No more was needed for petitioners to file the instant claim. See *Kubrick*, 444 U.S. at 123 (plaintiff "armed with the facts about the harm done to him" must make "reasonably diligent presentation of tort claims against the Government"); *Hohri* v. *United States*, 586 F. Supp. 769, 787-788 (D.D.C. 1984) (Japanese-American internees were aware during World War II that they lost their property as a result of the government's evacuation and internment program; information necessary to challenge government's military necessity

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[7] Section 2401(b) provides: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues."

defense was available shortly after war), aff'd, 847 F.2d 779 (Fed. Cir.) (per curiam), cert. denied, 488 U.S. 925 (1988).[8]

Petitioners claim that the Sixth Circuit erred in failing to recognize that the facts present a "continuing tort" and that petitioners' claim therefore "did not accrue until the date of the last tortious act, February 7, 1985." Pet. 10, 11-13. Although the adverse effects of the State Department's decision did continue at least until the district court recognized petitioners' citizenship in 1985, the alleged tort itself was complete when the State Department refused to recognize petitioners' derivative citizenship in 1952. See, *e.g.*, *Ward* v. *Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) ("[a] continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation"; period of non-employment resulting from allegedly discriminatory actions did not constitute continuing tort); *Verner* v. *United States Government*, 804 F. Supp. 381, 383 n.2 (D.D.C. 1992) (negligent provision of medical services did not constitute continuing tort; veteran's FTCA claims time-barred). Petitioners had, in 1952, all the information needed to file an administrative claim. See, *e.g.*, *Lynch* v. *United States Dep't of Army Corps of Engineers*, 474 F. Supp. 545, 549 (D. Md. 1978) (FTCA claim accrued at time of Corps' alleged negligence in

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[8] Although the district court was unable to determine from the record when petitioners learned that they could not inherit their father's business interests in the Philippines, petitioners need not have known of that particular injury in order to bring a tort suit in 1952. See, *e.g.*, *Goodhand* v. *United States*, 40 F.3d 209, 212 (7th Cir. 1994); *K.E.S.* v. *United States*, 38 F.3d 1027, 1030 (8th Cir. 1994); *Federal Savings & Loan Ins. Corp.* v. *Haralson*, 813 F.2d 370, 377 (11th Cir. 1987).

1972, not in 1975 when Corps allegedly admitted the negligence), aff'd, 601 F.2d 581 (4th Cir. 1979).[9]

Finally, as the court of appeals recognized, the fact that the district court's 1985 order declaring petitioners to be U.S. citizens might have facilitated petitioners' tort claim does not mean that they were entitled to wait several decades for that order before pursuing the instant case. Assuming that a tort claim of this kind could properly be brought against the United States,[10] a district court could have considered, in the course of

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[9] The cases cited by petitioners (Pet. 11-12) stand for the legal proposition that, where there has been a continuing tort, the statute of limitations does not begin to run until the tort is complete. Those cases, however, do not support petitioners' contention that the facts presented here constitute a continuing tort, nor do those cases reflect any split among the circuits as to the definition of a continuing tort.

[10] Although the question whether such a tort claim would lie against the United States is not presented by this case in its present posture, petitioners would face significant legal hurdles in pursuing such an action. Under the FTCA, the United States may be held liable only "to the same extent [under applicable state law] as a private individual under like circumstances." 28 U.S.C. 2674. Thus, in *Akutowicz* v. *United States*, 859 F.2d 1122, 1126 (1988), the Second Circuit held that no FTCA action could be brought against the State Department for wrongful revocation of citizenship because "the withdrawal of a person's citizenship constitutes a quasi-adjudicative action for which no private analog exists." Additionally, the State Department's quasi-adjudication of a person's citizenship may possibly fall within the FTCA's provision that liability may not be "based upon the exercise or performance [of] * * * a discretionary function." 28 U.S.C. 2680(a); see *United States* v. *Gaubert*, 499 U.S. 315, 322-325 (1991) (discussing discretionary-function exception).

determining petitioners' negligence claim, whether petitioners were U.S. citizens.[11]

The asserted consequences flowing from the erroneous determination that petitioners were not citizens, which error was corrected by a district court in 1985, are indeed regrettable. Petitioners, however, apparently were in possession of all the information necessary to file a claim under the FTCA in 1952. The district court's 1985 ruling was not based on any newly discovered information, but instead rested on secondary evidence and the memories of witnesses that presumably would have been fresher in 1952. The purposes of the statute of limitations are therefore peculiarly implicated here, see *Kubrick*, 444 U.S. at 117, and the court of appeals correctly affirmed the dismissal of petitioners' untimely claim.

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[11] Petitioners argued below that they lacked standing to bring suit under the FTCA until they had been declared U.S. citizens. See Pet. App. 13. The district court found no basis for that claim (*id.* at 13 n. 3, 22), and petitioners do not raise it here. Even were that the case, however, petitioners had all the information needed to seek a declaration of their citizenship under 8 U.S.C. 1503 in 1952.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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